No. 15234.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACME DISTRIBUTING COMPANY, CALIFORNIA BEVERAGE & SUPPLY CO. and YOUNG'S MARKET COMPANY,

Appellants,

vs.

JOHN COLLINS, doing business as STAN'S STAGE COACH STOP, Alleged Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Jurisdiction.

Appellee adopts and incorporates herein the jurisdictional statement of Appellants.

Statement of the Case.

Counsel for Appellant under the captions "The History of the Case" and "The Pleadings" set forth their version of what they probably intend to be the statement of the case required by the rules of this Court. Such matter so set forth is garbled in that it contains both statement of fact in part, argumentative matter in part, and erroneous interpretation in part of portions of the testimony contained in the transcript of record referred

to. We ask that the Court disregard the argumentative feature in construing a true statement of the case.

On page 5 of Appellants' brief, in reference to an examination of the bankrupt at the instance of the receiver, it is said that the bankrupt testified that his wife claimed this home property as her own. The reference is to the Reporter's Transcript, page 56, reading as follows:

> "Q. Does she claim it as her own property, do you know? A. Well, she says it is. I don't know. We bought it in 1951, when we came here."

The question was not whether the wife owned the property as her separate or community property.

We think it evident the bankrupt started to say what the wife said, but did not finish, and ended by answering the question as to whether he knew, saying "I don't know. We bought it in 1951 when we came here."

We ask also that the court consider the testimony of Temperance Bailey, escrow clerk [Supp. Tr. of R. pp. 304-305] not referred to in the Statement of Counsel for Appellant, wherein Mrs. Bailey testified in effect that "if a conveyance to a married woman was intended as her separate property, it would be necessary to either so state in the conveyance, or a quitclaim deed be executed by the husband."

Preliminary Statement Relative to Questions Involved.

The principal questions to be determined on this appeal is the question of solvency, and whether or not the finding of insolvency by the Referee is unsupported by the evidence. We shall, therefore, devote the major portion of our argument to these questions.

ARGUMENT.

Application to Transfer Not Tantamount to Transfer.

Section 1:30 of the Bankruptcy Act defines transfer as follows:

> " 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein, or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily, or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage lien, encumbrance, gift, security or otherwise."

All that was done by the alleged bankrupt in the present case was to file an application with the Alcoholic Beverage Control of the State of California to transfer said liquor license to one Fred De Carlo. Said application to transfer is still pending. No transfer has been effected. Section 3b of the Bankruptcy Act provides as follows:

> "b. A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the—first—act of bankruptcy shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein."

It is plain that this section 3b is a limitation of the time within which a petition in bankruptcy may be filed.

The purpose of such a provision is to prevent fraudulent transfers from becoming impregnable to attack by

virtue of their being kept secret until the limitation period has lapsed. Such provision can certainly have no magic effect to convert an act not constituting a transfer into a transfer.

Insolvency at the Time of Filing Petition in Bankruptcy Is Complete Defense.

Sec. 3(c) of the Bankruptcy Act provides as follows:

> "It shall be a complete defense to any proceedings under the first act of bankruptcy to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him. If solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed——"

Section 1 (19) of the Bankruptcy Act defines insolvency as follows:

> "A person shall be deemed insolvent within the provision of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts."

The Alleged Bankrupt Did Not Commit the Act of Bankruptcy Complained of.

The chief issue in this appeal is the solvency of John Collins, the alleged bankrupt, at the time of the commission of the alleged fraudulent act, and at the time of the filing of the involuntary petition in bankruptcy against him. If he were solvent on the 4th day of August, 1955, the day on which he made application to transfer his said on sale general distilled liquor license, then he

did not commit any act of bankruptcy, and if he were solvent on the 22nd day of August, 1955, the date on which the involuntary petition in bankruptcy was filed against him, then the proceedings should be dismissed.

We contend that the finding of insolvency by the Referee is not supported by the evidence, in that the Referee failed to include among the assets of the alleged bankrupt community real property in which the bankrupt had an equity of $6,000.00. The Referee in his finding No. IV [Tr. 16] found as follows:

"IV.

"That the Referee finds that the bankrupt is insolvent; that all of his assets including property which would be exempt under the laws of the State of California, taken at a fair valuation, total in value the sum of $7,068.75, and the bankrupt's total liabilities as of the date of the filing of the involuntary petition herein amount to, and do now amount to, the sum of $8,867.23."

A summation of the assets included by the Referee in arriving at the sum of $7,068.75, and a summation of the liabilities in arriving at the sum of $8,867.23 are found in the Transcript of Record, commencing at page 267 and ending on page 277. The learned Federal Judge in effect accepted such finding of the Referee as far as it went, but found that the Referee erred in not including among the assets the equity of the alleged bankrupt in the real property.

In his Findings of Fact, the learned Federal Judge, in Finding No. III [Tr. 38], found as follows:

"III.

"The real property situate at 10423 East Townley Drive, Whittier, California, being the property in which the alleged bankrupt resides, was purchased

with community funds of the alleged bankrupt and his wife, Ada Collins, and is community property of the alleged bankrupt and his wife. Title to said property was taken in the name of Ada Collins, the wife of the alleged bankrupt for convenience only. The alleged bankrupt and his wife did not intend and there was no intention on their part, that said property become the separate property of the wife. The value of the equity of the alleged bankrupt and his wife in and to said real property is $6,000.00, and such equity is a portion of the assets to be taken into consideration in determining the solvency or insolvency of the alleged bankrupt."

And in Finding No. V [Tr. p. 39] found as follows:

"V.

"The alleged bankrupt was not insolvent on the 22nd day of August, 1955, the date of the filing of the involuntary petition in bankruptcy against him. At said time all of his assets, including property which would be exempt under the laws of the State of California, but excluding said distilled spirits license, taken at a fair valuation, total in value the sum of $13,068.75, and the alleged bankrupt's total liabilities as of the date of the filing of the involuntary petition against him amounted to, and do now amount to, the sum of $8,867.23."

Evidence Was Sufficient to Warrant the Inclusion of Real Property Among Bankrupt's Assets.

The entire question of solvency turns upon the proposition whether the home occupied by the bankrupt and his family at Whittier, California, was the wife's separate property or not.

We believe without question the evidence before the Referee was sufficient to have required the Referee

to include such property among the bankrupt's assets. Though title to the property was taken in the name of the wife of the bankrupt, it is the intent of the parties and not the form of the grant or the source of the funds which is determinative of the title to the property. However, in the instant case, the property was purchased with community funds. Section 164 of the Civil Code of the State of California, in defining community property, states:

> "All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property *wherever* situated heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property."

John Collins in reference to the source of the funds to purchase the real property [Tr. p. 198] stated in response to the following question, as follows:

> "Q. At the time of your marriage to Ada Collins, did you have any moneys of your own? A. No.
>
> Q. You accumulated money, did you, after your marriage? A. Yes.
>
> Q. Where did you keep those moneys in the State of New York? A. Usually. Well, some at home and some in the bank.
>
> Q. Where—do you live now? A. 10423 Townley Drive, in Whittier.
>
> Q. That place was purchased, was it, after you and Mrs. Collins came to California? A. That is true.
>
> Q. From what source was the money obtained to purchase that property? A. From the bank—the

Power City Trust Company—a bank in Niagara Falls, New York.

Q. Those were funds that were accumulated through your earnings, during your marriage? A. Yes, and my wife. The account was in the name of John A. and Ada J."

Nowhere in the evidence is there anything to show that the bankrupt intended that the property involved be the separate property of his wife, but there is ample undisputed evidence to prove that the bankrupt did not intend that the property be the separate property of his wife.

Title to the property was taken in the name of Ada J. Collins, a married woman. [Tr. p. 199.]

The bankrupt [Tr. p. 201] testified at length as to a conversation had in reference to buying the house; part of which conversation is as follows:

"A. We got to talking about buying the house there, and I had just come to California. I had explained to Mrs. Bailey, the escrow officer, that I had paid $100.00 down on this house. My wife had seen it and she liked it and I liked it, we were all happy. We agreed on the price, $13,100.00. This was just before Christmas, I don't remember what date it was, but about the 17th I think, and we wanted to try to move in before Christmas so that the kids could have a tree and everything. Mrs. Hogin was objecting to us moving in unless we could prove we had enough money to buy the house —we had to put up some $5,000.00 difference from what was owed on it to make the arrangement. I was going to just give them a check on it. She said if I could put the $5,000.00 in the bank, she would let us move in before Christmas. Well, the

bank objected to the check because it was a personal check on the Power City Bank, and they said, 'How do we know whether you have any funds there?' I said, 'I would call the bank by telephone and they will tell you.' They said, 'No' they could not do that because I could draw it out before this check got over there.' * * * I said, 'If I went over and got the money would you let us move in?' She said, 'I don't care as long as you put up the $5,000.00.' I said, 'All right, I will do that.' I went and I got the money and brought it back to the bank."

Mr. Collins further testified at page 202:

"Mrs. Bailey said something about community property, and asked me if I knew what it was all about; and she said, 'If you want to put this property in your wife's name, that is, it is her property and you have nothing to do with it, you will have to sign off these extra papers they have in the bank, or the title company' she said, would not issue the title.

"I said I did not want it to be her separate property; it came from our life savings, it belonged to all five of us, my wife and three kids. Anyway, she went ahead and my wife signed the paper and made the arrangement with the title company, they insured it on the assumption it was community property."

On the tax assessor's records, the property is assessed to "John A. Collins and Ada Collins." [Tr. 204.]

Further [Tr. p. 208] Mr. Collins testified as follows:

"Q. Mr. Collins, did you ever execute a quitclaim deed or any instrument conveying any interest in this property to Mrs. Collins? A. When they asked me if it was going to be her own separate

property, they told me if it was going to be that I would have to execute a quitclaim deed, or else have it put on a grant deed. The one we had stated 'Ada Collins, a married woman'—I did not want it put down as hers or hers alone separate property.

Q. Did you answer the question I asked? A. Did I sign a quitclaim deed?

Q. Yes. A. I did not."

Further in reference to the source of the purchase price, Mr. Collins testified: [Tr. p. 209.]

"Q. You were putting up the $5,000.00 out of your savings? A. It belonged to my wife and I. The $5,000.00 came out of a joint account belonging to my wife and me.

Q. It was your earnings? A. All my life, yes.

Q. What part of it did your wife earn? A. Well, just because my wife is at home, taking care of the kids, I think she earns as much as I do.

Q. I am talking about the income that went into that $5,000.00 that was back in New York, how much of that income did your wife earn?

The Referee: Did she work? A. She did not work, no.

Further Mr. Collins testified: [Tr. p. 210.]

"Q. Have you any reason now that you can give the Court why you had that property put in your wife's name? A. For the sake of convenience. She was there and she could go ahead and get the escrow started and complete it so that we could move in before Christmas, 1951."

Ada Collins, wife of the bankrupt, testified [P. 282] as follows:

"Q. Where do you reside? A. 10223 East Townley Drive, Whittier.

Q. Is that the property that was acquired by purchase from Mr. and Mrs. Hogan? A. It is.

Q. Did you have any conversation with Mr. Collins as to how the property should be vested? A. No.

Q. Did Mr. Collins ever tell you to have the property deeded to you, in your name only? A. No.

Q. Did Mr. Collins ever tell you that the property was yours? A. No.

Q. When did you and Mr. Collins marry? A. In 1938.

Q. At the time of your marriage did you have any money or property of your own? A. I did not.

Q. Did Mr. Collins have any? A. No.

Q. What was the purchase price of the property involved here? A. $13,100.00.

Q. How much was paid down at the time of purchase. A. Approximately $5,300.00.

Q. Do you know where that money came from? A. Well, it was an accumulation of savings over a period of years from his earnings.

Q. During the time of your marriage, were you ever gainfully employed? A. No."

On page 283 on cross-examination of Mrs. Collins, she testified as follows:

"Q. You had charge of the opening of the escrow yourself? A. Yes.

Q. And you directed that the property be taken in your name? A. Well, I don't know as I directed it be put in my name. It was a matter of convenience, so that I could take care of things so that he could go back East to get the money.

Q. You were the one that directed the deed be made to you? A. I don't know whether I should answer 'yes' or 'no.' Do you have to direct someone?

Q. Who drew the deed? A. I signed the paper if that is what you mean.

Q. You mean the escrow instructions? A. Yes."

Further at page 284:

"Q. What did you mean by 'for convenience?' A. Well, there are papers and things. Naturally they have to be signed when you go into an escrow.

Q. Yes. A. My husband had to go back East to get the money because they would not take a personal check on any out-of-town bank. We wanted to be in there by Christmas, and Mrs. Hogan wanted to be with her husband for Christmas. There was not much time between the time we looked at the place and Christmas. John had to go back East, and someone had to be here to take care of the paper work, and that is the way it was left.

Q. And before he left who directed the title to the property be made to you? A. I did not direct any title to be made to me at all.

Q. Was Mr. Collins the one that gave directions? A. I don't know.

Q. You don't know who did? A. All I know is that I signed the papers.

Q. You claim now that you don't own the property as your separate property? A. We own it together. We don't own anything that way. What belongs to one belongs to the other. We just don't live that way."

Temperence Bailey, the escrow clerk who handled the transactions when the property was purchased, while testifying that she did not remember a particular conversation with the bankrupt, however, substantiates the testimony of the bankrupt when she testified as follows: [Supp. Tr. p. 304.]

"Q. By the Referee: —Mrs. Bailey, you do have occasions in your business to request a title company to issue a policy of title insurance on property which is passing through your escrow, is that not the fact. A. Yes.

Q. You do have occasions where property is requested to be vested in a married woman as her separate property—you do have those situations? A. Yes.

Q. When you request a policy of title insurance in that kind of a situation—where the title is to be vested in a married woman as her separate property, do you transmit to the title company any papers in addition to the deed? A. The deed would contain a clause that it was to be—was deeded to the one, the grantee, the property to be the separate property; that there would be an agreement on the deed, signed by husband and wife that it was to be the separate property of the grantee.

Q. In other words, your custom, then, would be that the husband would sign on the deed itself? A. Yes, either that or on a quitclaim deed, in a separate instrument.

Q. The husband would execute a quitclaim deed? A. It would be embodied in the instructions.

The Referee: Now, we have the instrument here, as Petitioning Creditors' Exhibit No. 8; and the Court finds nothing with respect to the vesting of the title. You say it would be right on this instrument? A. Yes."

As stated by Judge Yankwich in his memorandum opinion [Tr. of R. p. 28] the Findings of the Referee must be accepted unless clearly erroneous. However, if there is no substantial evidence to support it, a finding will not be sustained.

In re Leichter, 3 Cir. 1952, 197 F. 2d 955, at page 957, it is said:

> "A finding of fact must have more substantial foundation than an intuition— It is well settled that speculation cannot be substituted for proof."

The Referee in his Memorandum on Remand [Tr. p. 25] states that he does not believe the testimony of the bankrupt and his wife on the ground that it is entirely self-serving. He entirely disregards the testimony of Temperance Bailey [Sup. Tr. of Record] a purely disinterested person, which in substance substantiates the testimony of both the bankrupt and his wife. He likewise entirely disregards the testimony of Mrs. Collins, although her testimony is absolutely unimpeached. As set forth in the opinion of Judge Yankwich [Tr. of R. pp. 26b-36] and in the cases therein cited by him, the Referee was plainly in error in arbitrarily disregarding the testimony of Mrs. Collins and the testimony of Temperance Bailey in support thereof.

In his said Memorandum Opinion on Petition for Review [Tr. of R. pp. 26b-36], Judge Yankwich has so far stated the law applicable to this case that we deem it unnecessary to amplify our brief by further citation of cases.

We respectfully submit that the Order of Judge Yankwich reversing the order of the Referee be sustained.

Respectfully submitted,

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